United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 21212

SHARON DE LANGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court
For the Southern District of California
Southern Division

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The Supreme Court's position in the Neustadt case and the Indian Towing case sets forth its position regarding the interpretation of 28 USC 2680 (h).

With regard to the appellee's second argument on the issue of Federal Employees' Compensation Act, appellant's position is that the injury did not arise out of or in the course of her employment as a government employee.

ARGUMENT

I

THE SUPREME COURT'S POSITION IN NEUSTADT AND INDIAN TOWING SETS FORTH ITS POSITION.

Appellee's Brief contains four distinct and contrary approaches toward an interpretation of 28 USC 2680 (h). All of these approaches are contrary to the plain language of the Supreme Court's statement in United States v. Neustadt, 366 U.S. 696, 81 S. Ct. 1294, 6 L. Ed. 2d 614, (1961) where the Court stated,

> ". . . Such a claim does not 'arise out of . . . misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. . . . "

The key to the Court's thinking is to determine whether or not the claim arose out of the misrepresentation itself or whether it arose as a result of negligent actions which were consummated by the misrepresentation as in the case at bar.

A reading of the footnote in United States v. Neustadt, supra, along with the case of Indian Towing Co. v. United States, 350 U.S. 61, 100 L. Ed. 48, 76 S. Ct. 122 (1955), clearly demonstrates the position of the Supreme Court and such reasoning should be binding upon this Court.

The government's arguments completely beg the question put before this Court; DID THE PLAINTIFF'S INJURY ARISE OUT OF THE MISREPRESENTATION?

a) First, the appellee argues (p. 7) that the Court should follow the literal meaning of 28 USC 2680 (h) when under the decision of Neustadt and

Court.

In support of this position appellee argues at length from the Hungerford decision which appellant has clearly stated should be reversed and not relied upon.

b) Second, the appellee quotes at length a number of decisions which would not involve commercial or financial interests. Suffice it to say that appellant's Opening Brief went into great length to analyze and distinguish these cases from the case at bar.

c) Next, appellee seeks to offer to this Court a distinction based upon whether or not the statement involves a verbal or written communication as distinguished from an action such as a turn signal. Thus, they would argue that a communication by way of a signal is to give rise to liability while verbal language would exclude the government from liability under the act. This analysis, as has been previously stated, flies directly in the face of the Neustadt decision and could not have been the intent of Congress.

d) Finally, by way of footnote 8, at page 15, of its Brief, appellee draws an analogy between the case at bar and a commercial or financial situation. Plaintiff's damages flow from a course of conduct and a communication on the part of a Navy doctor after plaintiff had been informed that she was no longer employed. Her damages clearly were physical and mental as set forth in the transcript from page 152, line 19, through page 154, line 10. This situation is one of personal injury to health and well-being caused by words spoken directly to plaintiff, as covered in appellant's Opening Brief, page 8.

II

APPELLANT'S INJURY DID NOT ARISE OUT OF OR IN THE COURSE OF HER EMPLOYMENT AS A GOVERNMENT EMPLOYEE.

For the first time on appeal the government raises the issue that the appellant's claim is excepted from the coverage of the Federal Tort Claims Act by 5 USC (September 1966 revised), 8173.

The appellee attempts to demonstrate this on the basis that appellant has her remedy under the Longshoremen's and Harbor Workers' Compensation Act or the Federal Employees' Compensation Act.

The trial transcript demonstrates that the appellant was not employed at the time of the trial. (Tr. Vol. 1, p. 7, ll. 4-5). The record demonstrates that she was last employed July 19, 1964. (p. 7, ll. 14-16). She understood that she was being subjected to an employment physical (p. 8, ll. 19-21), and that the examination was solely for employment purposes (p. 32, ll. 3-7).

She was told on July 19 and July 20, 1964, that she could no longer work at her job (p. 13, ll. 8-10). She was further told that the test must be negative in order for her to maintain employment (p. 33, ll. 8-11). She was furthermore informed by the defendant that the government did not take care of syphilis and tha she must retain a private physician (p. 14, ll. 2-14).

It was not until after she had been told that she was no longer employed that the inquiry began which led to the acts which form the basis of this claimed injury. In other words, it was only after she was told that she was no longer employed, that she could no longer work, that she asked for the reason for this, with

The examination was, in fact, a condition precedent to re-employment or continued employment. The Federal Employees' Liability Act provides coverage while an employee is ". . . in performance of his duties". 5 USC 1966 revision, Section 8102.

At the time the communications were made to the applicant, she was at home, and not performing any duty for the government. The employment services of a waitress are clearly not involved in the negligent acts complained of. Appellee cites Larson's Workmen's Compensation Law, 1965 Edition, Section 27.32, in support of its position. This section, however, in cases cited therein, are cases where inoculations were given as required by employers, or injections for infections and other disabilities resultant from the inoculations or negligently administered tests.

In this case, appellant makes no claim that the blood tests were negligently administered or that she suffered any disease as the result of any infection or other improper inoculation. The tortious conduct for which appellant complains occurred subsequent to the blood test and was a negligent course of conduct and an ineptness arising subsequent to and independent of the administering of the test.

Even in cases where infections have resulted from Wasserman tests themselves, compensation had been denied where public rules or regulations have required such tests. See King v. Arthur, 245 N.C. 599, 96 S.E. 2d 836 (1957) (Information resulting from blood test).

This case, therefore, did not arise while appellant was in the performance of her duty, but rather the actions which gave rise to appellant's claim occurred

out of performance of any duty of employment within the meaning of the Federal Employees Liability Act. 5 USC (1966 revised, Sections 8101-8150) or the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901-950).

CONCLUSION

Appellee has failed to comment on the appellant's argument that to relieve United States of responsibility in such a case would place the burden upon the individual physician to defend himself. Appellant wishes merely to reiterate this position on public policy to the Court. A policy which will affect areas of litigation much broader than the area covered by the matter at bar.

For the foregoing reasons, it is respectfully submitted that the judgment o the District Court shoud be reversed and the case remanded.

Respectfully submitted,

BEAR, GELFAND, GREER & BAUER

By: /s/ MICHAEL I. GREER

Attorneys for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circui and that, in my opinion, the foregoing brief is in full compliance with those rules

/s/ MICHAEL I. GREER